

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1364

A.M.

vs.

R.M.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On January 10, 2018, following a five-day trial, a judge of the Probate and Family Court (divorce judge) issued a judgment of divorce nisi (judgment nisi) dividing the marital estate of R.M. (husband) and A.M. (wife) pursuant to G. L. c. 208, § 34. On March 7, 2018, prior to the "judgment absolute" date of April 10, 2018,¹ the wife purchased a new home (Meetinghouse Lane) funded partially with a commission check she received from her employer in February of 2018. On April 23, 2018, the husband filed a motion pursuant to Mass. R. Dom. Rel. P. 60 (b) (2)² seeking to include Meetinghouse Lane in the distribution of the

¹ "Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of ninety days from the entry thereof." G. L. c. 208, § 21.

² "[B]ecause the language of Mass. R. Dom. Rel. P. 60 is identical to the language of Mass. R. Civ. P. 60 . . . all references herein will be to the Massachusetts Rules of Civil Procedure." Sahin v. Sahin, 435 Mass. 396, 398 n.4 (2001).

marital estate, which motion the divorce judge denied on May 29, 2018. The husband appeals from the order denying his rule 60 (b) (2) motion, as well as two fee awards made by a different judge (contempt judge): (1) an order dated May 30, 2018, awarding attorney's fees of \$1,750 to the wife, and (2) an amended judgment of contempt dated June 28, 2018, awarding an additional \$1,000 in attorney's fees to the wife. We affirm.

Rule 60 (b) (2) motion. We review a trial judge's ruling on a rule 60 (b) (2) motion for an abuse of discretion.³ See Cahaly v. Benistar Prop. Exch. Trust Co., 451 Mass. 343, 363 (2008). "A party seeking postjudgment relief on grounds of 'newly discovered evidence' invokes rule 60 (b) (2), and must satisfy four requirements: '(1) the evidence has been discovered since the trial; (2) the evidence could not by due diligence have been discovered earlier by the movant; (3) the evidence is not merely cumulative or impeaching; and (4) the evidence is of such a nature that it would probably change the result were a new trial to be granted.'" Id. at 361, quoting

³ "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008).

United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 52 (1st Cir. 2002).

In his rule 60 (b) (2) motion, the husband argued that Meetinghouse Lane constituted "newly discovered" marital property subject to equitable distribution under G. L. c. 208, § 34, because it was purchased after the entry of the judgment nisi but prior to the official dissolution of the parties' marriage.⁴ See Ross v. Ross, 385 Mass. 30, 35 (1982) (divorce not final until judgment becomes absolute). The husband has not cited to, nor are we aware of, any legal authority requiring a judge to treat property purchased between the date of the judgment nisi and the date of the judgment absolute as part of the marital estate for purposes of § 34.⁵ Rather, "the marital

⁴ The husband further argues that Meetinghouse Lane should be treated as an asset that "accrued during the marriage" because the down payment included a commission that the wife earned in 2017, but did not receive until February of 2018. The husband did not raise this argument in his rule 60 (b) (2) motion. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006) ("An issue not raised or argued below may not be argued for the first time on appeal" [quotation omitted]). Moreover, the wife's receipt of a commission in February of 2018 does not appear to constitute "newly discovered evidence" insofar as the husband was aware at the time of the trial that the wife typically received her annual commission check in February for sales completed in the prior calendar year. See Wojcicki v. Caragher, 447 Mass. 200, 213 (2006) ("Evidence is considered newly discovered . . . only if it was unknown and unavailable at the time of trial despite the diligence of the moving party" [quotation omitted]).

⁵ Indeed, such a rule could present difficulties given that the automatic restraining order prohibiting the parties from making major purchases during a pending divorce action is automatically

estate is typically determined as of the date of the divorce trial," though "the judge has the discretion to make that determination at another date when warranted by the circumstances of a particular case." Moriarty v. Stone, 41 Mass. App. Ct. 151, 154 (1996).⁶ See Child v. Child, 58 Mass. App. Ct. 76, 79 (2003) ("The trial judge has a certain flexibility in determining the exact date at which assets must be considered and valued"). Here, the divorce judge permissibly exercised her discretion and determined the marital estate as of the date of the divorce trial. See Moriarty, supra. The husband has therefore failed to establish that the wife's purchase of Meetinghouse Lane after the entry of the judgment nisi "would probably change the result" of the \$ 34 property

vacated upon the entry of the judgment of divorce, rather than on the judgment absolute date. See Rule 411 of the Rules of the Probate Court (2012).

⁶ The husband relies on this court's dicta in Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985), in support of his argument that the composition of the marital estate should be determined as of the judgment absolute date. However, in Davidson, we merely observed that, instead of a fixed date for determining the marital estate in all cases, different dates may be determined on a case-by-case basis. See id. at 370 n.9 ("In this case it makes no difference whether that property is identified as of the time of the divorce trial, the judgment nisi or the judgment absolute, as the situation was the same at all of those times. We intend no suggestion of a rule fixing any of those dates, or excluding some earlier time in appropriate circumstances, e.g., the date of the separation of the parties, as determinative in identifying divisible property. We think the development of the law in this respect is best left to a case-by case analysis").

division if the evidence were reopened (quotation omitted). Cahaly, 451 Mass. at 361. Accordingly, the denial of the husband's rule 60 (b) (2) motion was not an abuse of discretion. See id. at 363.

Attorney's fees. We turn to the husband's challenge of the May 30, 2018 order awarding the wife \$1,750 in attorney's fees. On April 13, 2018, the wife sought leave of court to file a complaint for contempt alleging the husband had failed to make certain payments required by the divorce judgment. On April 23, 2018, the contempt judge allowed the wife's request and scheduled a contempt hearing for May 30, 2018, "unless [the husband] has obtained a stay of the [divorce] judgment at least [seven] days prior to the hearing." On May 21, 2018, the husband filed a motion to stay in the Probate and Family Court without marking it for a hearing. The parties appeared for the contempt hearing on May 30, at which time the contempt judge (1) denied the husband's motion to stay, (2) continued the contempt matter to provide the husband with an opportunity to seek a stay from the Appeals Court, and (3) ordered the husband to pay the wife's attorney's fees in the amount of \$1,750 due to his failure to obtain a stay seven days prior to the hearing.⁷

⁷ As set forth in the detailed affidavit of the wife's counsel submitted at the conclusion of the May 30 hearing, the wife incurred a total of \$2,870 in contempt-related fees through the date of the hearing. See Tatar v. Schuker, 70 Mass. App. Ct.

The husband contends that the fee award was improper as his motion to stay the divorce judgment was timely filed pursuant to Mass. R. A. P. 6 (a), as appearing in 454 Mass. 1601 (2009). We disagree. The contempt judge was permitted to award fees on the basis that the husband unnecessarily protracted the proceedings. See Salten v. Ackerman, 64 Mass. App. Ct. 868, 875 (2005) ("judge [is] in the best position to determine whether the husband prolonged the case"). Moreover, because the husband was ultimately found guilty of contempt (which he does not challenge on appeal), the wife was entitled to recoup all reasonable attorney's fees incurred in connection with her complaint for contempt. See Coppinger v. Coppinger, 57 Mass. App. Ct. 709, 714 (2003) ("presumption [exists] in favor of an award of reasonable fees and costs for a successful plaintiff in a

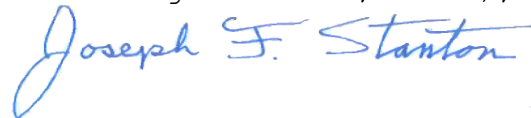
436, 451 (2007) ("the probate judge was justified in accepting the validity of the fees as recounted in the affidavit of [the wife's] counsel").

contempt action"). Accordingly, we discern no abuse of discretion in the fee award.^{8,9}

Conclusion. The orders dated May 29, 2018, and May 30, 2018, are affirmed. The amended judgment of contempt dated June 28, 2018, is affirmed.¹⁰

So ordered.

By the Court (Meade,
Massing & Lemire, JJ.¹¹),



Clerk

Entered: July 19, 2019.

⁸ As for the husband's challenge of the amended contempt judgment, dated June 28, 2018, ordering him to pay the wife \$1,000 in attorney's fees, this claim does not rise to the level of reasoned appellate argument contemplated by Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975), thus we do not consider it. See K.A. v. T.R., 86 Mass. App. Ct. 554, 567 (2014). The husband does not provide any legal authority for the proposition that the amended judgment of contempt must be "stricken" due to lack of service via mail by the Probate and Family Court. Moreover, the husband concedes that he received notice of the amended judgment through the wife's counsel.

⁹ To the extent that we do not address the husband's other contentions, they "have not been overlooked. We find nothing in them that requires discussion" (quotation omitted).

Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018).

¹⁰ The wife's request for appellate attorney's fees is denied.

¹¹ The panelists are listed in order of seniority.